

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

FEDERAL TRADE COMMISSION,	.
	.
Plaintiff,	.
	. Case No. 20-cv-18140
vs.	.
	. Newark, New Jersey
HACKENSACK MERIDIAN HEALTH,	. March 11, 2021
INC., et al.,	.
	.
Defendants.	.

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE JAMES B. CLARK, III  
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings)

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3 THE COURT: Hey, folks, Judge Clark here. Let me  
4 say before we get started, we're on the record in FTC versus  
5 Hackensack Meridian Health, et al. It's Docket  
6 Number 20-18140 (JMV). And it is about 1:35 in the afternoon  
7 of March 11th, 2021.

8 Can we have appearances of counsel, please.

9 MR. LASKEN: Good afternoon, Your Honor. This is  
10 Jonathan Lasken from the FTC. With me on the line are  
11 Mr. Charles Dickinson, Ms. Emily Bowne, and Ms. Lindsey Bohl  
12 appearing for the FTC today.

13 THE COURT: Good afternoon.

14 MR. LASKEN: Good afternoon.

15 MR. SAINT-ANTOINE: Good afternoon, Your Honor.  
16 This is Paul Saint-Antoine of Faegre Drinker Biddle Reath on  
17 behalf of Hackensack Meridian. And also on the phone are my  
18 colleagues Lee Roach and Dan Delaney.

19 THE COURT: All right. Good afternoon.

20 MR. KESSLER: Good afternoon, Your Honor. This is  
21 Jeffrey Kessler from Winston & Strawn appearing for  
22 Englewood. And with me on the phone are my colleagues David  
23 Dahlquist, Heather Lamberg, and Jeffrey Amato.

24 THE COURT: All right. Good afternoon.

25 MR. BUCCI: And, Your Honor, Jim Bucci, from Genova

1 Burns, local counsel for Englewood.

2 THE COURT: Good afternoon. Is that --

3 MR. KASS: Good afternoon, Your Honor. This is  
4 Colin Kass, Proskauer, on behalf of the Hospital For Special  
5 Surgery, HSS. With me is Ed Kornreich and David Munkittrick.

6 THE COURT: Good afternoon.

7 And for New York Presbyterian?

8 MR. STEREN: Good afternoon, Your Honor. This is  
9 John Steren from Epstein Becker & Green. And with me on the  
10 phone is my partner Mark Lutes.

11 Okay. Well, welcome all. It's a full house today,  
12 even though we are doing it virtually.

13 I have a number of issues we need to tackle. We  
14 had a call about two weeks ago, and you've done a lot of  
15 things since then, and we've received a lot of briefs and a  
16 lot of letters, and I want to try and attack these issues --  
17 or, you know, to resolve them -- I don't say attack them --  
18 as quickly as possible, because I know everybody's on a tight  
19 schedule, and we want to keep the case moving along.

20 I think I'll deal -- I'm going to have to deal with  
21 the issues one at a time, unless they're logically grouped.  
22 And I want to touch on the first issue, which is the  
23 Englewood Hospital subpoena to the Hospital of Special  
24 Surgery. I have Document Number 98 -- Document Number 98 on  
25 the docket is the motion by the Hospital of Special Surgery

1 seeking to quash the subpoena. And that's dated March 2nd,  
2 2021. And I have the reply -- or the response from  
3 Englewood. It's Number 116 on the docket, and that's dated  
4 March 9th, 2021.

5 I've reviewed the briefs, and I think I understand  
6 the general -- the gist of the argument. I'm happy to hear  
7 from you briefly. You know -- and I would, you know, urge  
8 and caution folks not to replot the field that has been  
9 plowed in the briefs. But if you -- if there's something you  
10 want to add, I'm more than happy to hear from you. So, you  
11 know, it's Hospital For Special Surgery's motion.

12 So, Mr. Kass, anybody on your team want to address  
13 it? Or are the papers sufficient?

14 MR. KASS: Yes, Your Honor, we would like to  
15 address a few points, particularly points that arose from the  
16 response that Englewood filed the other day.

17 I think when you look at the briefing, you'll see  
18 that the facts are not really in dispute by anyone. They're  
19 not in dispute by us. They're not in dispute by the FTC.  
20 And they're not in dispute by the defendants.

21 We are a specialty hospital. We only do  
22 orthopedics. We don't provide the comprehensive care that  
23 insurers need to have in their networks. Englewood doesn't  
24 deny that. And over their 2 million documents that they  
25 produced and their 10 insurers that they subpoenaed and the



1 13 other GAC hospitals that they subpoenaed, they haven't  
2 come up with any evidence of any threats by any insurer to  
3 drop the defendants in favor of HSS primarily because we  
4 don't do it, and we can't do it, and under the regulations we  
5 can't do it.

6 Now, I'd like to talk about the -- you know, the  
7 legal analysis that underlies the parties' position, because  
8 Englewood's position is based on a clear error of law. But  
9 before I do that, I'd like to address specifically three key  
10 cases that are in the papers. The first one is the FTC  
11 challenge to Advocate -- to Advocate Health. That's a  
12 Seventh Circuit case. And Englewood relies on this case as  
13 their key case to show that specialty hospitals are included  
14 in a GAC market.

15 But they actually misread the case that they  
16 themselves cite. The expert in that case, the FTC expert,  
17 included local hospitals but excluded what he called  
18 destination hospitals, which included academic hospitals,  
19 specialty hospitals, like cancer hospitals, and children's  
20 hospitals. And I don't know whether when Englewood's counsel  
21 was reading the brief, they just missed the word "excluded,"  
22 but that is, in fact, what the expert did. They excluded  
23 specialty hospitals from the relevant market.

24 And what the district court said was, well, why did  
25 you do that? That doesn't make any sense.

1 And didn't grant the preliminary injunction.

2 But the Seventh Circuit then reversed the district  
3 court saying that these destination hospitals, these  
4 specialty hospitals are not properly considered part of the  
5 relevant market because they face different sets of demands.  
6 So academic hospitals, even though they provide exactly the  
7 same services as local GAC hospitals, are not properly  
8 considered part of the relevant market under the Seventh  
9 Circuit's decision in Advocate Health, which is exactly what  
10 we're saying in our brief. Orthopedic services, specialty  
11 services just simply are not a substitute for having a local  
12 hospital that employees and their families can turn to when  
13 they need them. That's the first case I'd like to talk  
14 about.

15 THE COURT: All right.

16 MR. KASS: The second case -- sorry?

17 THE COURT: No. Go ahead. I just said "all  
18 right," assuring you that I'm still here and I'm listening  
19 carefully.

20 MR. KASS: Thank you.

21 The second case I'd like to talk about is Aggrenox,  
22 In re Aggrenox Antitrust Litigation. And that is a case,  
23 it's one of the many that we cited in which the court held  
24 that -- marked that products outside the alleged relevant  
25 market are not proper for discovery. And in that case,

1 the -- the plaintiffs alleged that there was a market for  
2 Aggrenox, which is branded pharmaceutical and its generic  
3 equivalents.

4 The defendants said, no, we want to undermine and  
5 challenge that market definition by looking to other branded  
6 pharmaceutical products that may compete at the branded  
7 leveled with Aggrenox.

8 What the court held was discovery would be  
9 inappropriate and denied discovery of these other products  
10 precisely because, as the court said, the effect of any of  
11 these other products, if there was any, would -- requires no  
12 evidence that is not already possessed by the defendants,  
13 which is exactly what we said in this case, if there is  
14 competition between HSS, if an insurer has ever threatened to  
15 replace the defendants with HSS, Englewood and Hackensack  
16 would know about it, and they would have it in their files.  
17 And if they didn't have it in their files, the insurers, the  
18 ten insurers that cover almost all of the market would have  
19 it in their files.

20 So that's the other case that we'd like to point  
21 out. And importantly Englewood does not address this case in  
22 their brief.

23 The third case that I'd like to talk about is --  
24 and it's actually two cases but they're of a kind. One is In  
25 re Apple Antitrust Litigation, and the other is *In re eBay*

1 Antitrust Litigation. That is a case where both courts held  
2 that the substantial need test of Rule 45(d)(3)(C) applies to  
3 exactly the same kinds of documents Englewood is seeking from  
4 HSS here. That is competitive strategies -- you know,  
5 competitive strategies concerning -- in that case, there was,  
6 you know, the technology markets at issue -- and the courts  
7 held that the substantial need test applies and that that  
8 test was not satisfied.

9 And, again, Englewood does not address either of  
10 those two cases in this -- in their brief.

11 So with that as background, I'd like to just spend,  
12 you know, a brief minute on the substantial need test,  
13 because, this, again, is where Englewood is leading the court  
14 into clear error. What Englewood says is that  
15 Rule 45(d)(3)(C) does not apply and the substantial need test  
16 does not apply. They make no effort whatsoever to satisfy  
17 the substantial test. They simply say that it does not  
18 apply.

19 They are wrong. The Apple, eBay cases that I just  
20 mentioned established that it does apply.

21 But what is Englewood's argument as to why it does  
22 not apply? Well, they said there's a protective order. They  
23 say a protective order is a silver bullet to avoid any motion  
24 to quash under 45(d)(3)(C) and that is simply not the case.

25 Under the rules, Rule 45(d)(3)(C) is triggered as

1 long as a subpoena requests confidential commercial  
2 information. There is no dispute here that the subpoena  
3 seeks HSS's confidential commercial information. Once a  
4 subpoena requests that information, the rules make it clear  
5 that the burden shifts to the requesting party to show a  
6 substantial need that cannot otherwise be met. If they meet  
7 that burden, if they meet that burden, then the court has to  
8 balance the interests of the requesting party and the  
9 subpoenaed party factoring in issues of burden and --  
10 confidential information, and a protective order might be  
11 relevant at that point.

12 But the threshold requirement is that they  
13 establish a substantial need that cannot otherwise be met.

14 Now, Englewood has two responses to that. First,  
15 what they say is that -- is they point to other cases that  
16 are not brought under 45(d)(3)(C) saying that the standard is  
17 really one of relevance under Rule 26 and question the  
18 burden.

19 That is incorrect. If we had brought a motion  
20 under 45(d)(1), which is what their Gould case that they cite  
21 repeatedly, was, a motion under 45(d)(1), that would be  
22 correct. That -- motions under 45(d)(1) focus on burden and  
23 proportionality as in Rule 26; it's a heightened standard  
24 because of burden. But that rule does not apply to motions  
25 like ours, which is brought under 45(d)(3)(C). Okay? Under

1 45(d)(3)(C), it's the substantial need test that applies.

2 Englewood's next argument is that, well, not every  
3 single one of their request seeks confidential information.  
4 And they point to only one request out of their many  
5 requests, which is their last request, really, into  
6 advertising, RFP 13. They say, well, RFP 13 seeks publicly  
7 available information, and, in fact, they include it in their  
8 brief, an example of HSS's advertising.

9 Okay. So is there one request that seeks public  
10 information? Yes. There is. That is the tail wagging the  
11 dog. Virtually all of their requests and all of their  
12 requests other than 13 seeks our confidential information  
13 which triggers the substantial need test.

14 I don't want to get down a rabbit hole on this one  
15 RFP 13. Suffice it to say that even under the rule of  
16 proportionality under Rule 26, they do not need further  
17 information about our advertising primarily because they  
18 already have it. They've attached it to their brief. Two,  
19 it's not relevant because it is focused on patient decisions,  
20 not insurer decisions, and the insurer network decisions is  
21 what this case is all about. And that's what the Third  
22 Circuit held in Penn State. It's what the Seventh Circuit  
23 held in Advocate and in Evanston before that. And that's  
24 what all of the cases have held for the last 10 or 15 years,  
25 including their favorite case, which is Jefferson that said

1 focusing on the patient is incorrect. You have to focus on  
2 the insurers. And, in fact, the FTC lost the Jefferson case  
3 primarily because they lost sight of their own learning,  
4 which is you have to focus on the insurers, not the patients.  
5 And advertising only goes to patients; it doesn't go to  
6 insurers, which is Stage 1 of the two-stage competition that  
7 the Third Circuit identified in Penn State.

8           So for those reasons, we believe the substantial  
9 need test applies. We don't think that they've made any  
10 showing whatsoever that the substantial need test is  
11 satisfied. Again, the concept -- their concept that somehow  
12 we could replace -- that we could replace the defendants in  
13 insurer networks, you know, makes no sense for a couple of  
14 reasons. One, the regulation itself in New Jersey says that  
15 insurers that do business in Bergen County, that have  
16 covered -- in Bergen County, must contract with a local acute  
17 hospital. They do not deny -- Englewood does not deny that  
18 HSS does not fit within the geographic range of that statute,  
19 and they do not deny that we are not an acute care hospital  
20 that fits the definition of that regulation.

21           Instead, what they say is, well, that statute only  
22 applies to "managed care plan," as though somehow a managed  
23 care plan is a small percentage of the market. That's what  
24 they would like you to believe. They don't actually say it.  
25 And they can't say it because -- virtually hospital -- every

1 healthcare plan that every employee is on, which is what this  
2 case is about, is a managed care plan. Under the applicable  
3 regulation, a managed care plan is basically a plan in which  
4 the insurer has a provider network. Exactly what we're  
5 talking about here. That's number one.

6           Number two, they say, well, we provide -- Englewood  
7 says, well, we provide some services for orthopedic patients  
8 in Bergen County. There's no question that we do. I mean,  
9 we do have orthopedic services, outpatient orthopedic  
10 services in Bergen County. But outpatient services are not  
11 part of the alleged relevant market, and they're not a  
12 substitute for having inpatient local GAC hospitals.

13           And so for those reasons, you know, they cannot  
14 establish that -- you know, they cannot establish that they  
15 have a need for discovery from us, particularly in light of  
16 the fact that they've subpoenaed and released 12 of 13 other  
17 full GAC hospitals that they claim compete. If they can't  
18 prove competition from 13 other GAC hospitals that offer all  
19 of the same services that they offer and are basically the  
20 same distance away as us, they're certainly not going to be  
21 able to prove that HSS is the silver bullet that saves this  
22 anticompetitive merger. It's just not going to happen. So  
23 they can't establish a substantial need.

24           They also can't meet the second element of the  
25 substantial need test, which is that their needs cannot



1 otherwise be met. And, again, we invited them over and over  
2 and over again to come forward with some evidence that we are  
3 a threat.

4 But if that evidence exists, it is more than  
5 covered by the -- it is more than covered by the subpoenas  
6 that they've already issued and the 2 million documents that  
7 they produced.

8 So I know there are other issues that were raised  
9 by our motion, including the scope of the request and costs  
10 and others things. If the Court does not agree with our  
11 position on the substantial need test, and I'd be happy to  
12 address those.

13 But I will stop here unless the Court would like me  
14 to address those issues --

15 THE COURT: No. I don't think that's necessary,  
16 Mr. Kass.

17 I'd like to hear from -- well, is it Mr. Kessler,  
18 are you going to do the speaking? Or somebody else going to  
19 do the speaking for Englewood.

20 MR. KESSLER: This will be my partner, Heather  
21 Lamberg on this one.

22 THE COURT: All right.

23 Ms. Lamberg, they put a lot of stock in the  
24 substantial need test. What do you think?

25 MS. LAMBERG: Good afternoon, Your Honor. Heather

1 Lamberg from Winston & Strawn.

2 Yeah, so I would like to make a few points in  
3 response to Mr. Kass's arguments.

4 I'd also just like to step back for a second,  
5 because I want to put -- make sure we have the context here.

6 You know, first of all, we -- as you remember, we  
7 subpoenaed them on January 1st. Sitting here today, we don't  
8 even have one document. Not one. We have tried, Your Honor,  
9 to work with them. We tried to clarify, to narrow,  
10 et cetera, but the heart of their argument is really it's not  
11 relevant.

12 As you know, from their brief, they say, you know,  
13 we don't fit in the FTC's alleged market for two reasons,  
14 one, because we are not a general acute -- we don't provide  
15 the full cluster of general acute care services, and then,  
16 two, we only have one specialty service -- excuse me -- and,  
17 two, because we are not in Bergen County; we are in New York.

18 But the problem with their argument, Your Honor, is  
19 this. This is a discovery dispute. This is not the case  
20 that Judge Vazquez is going to hear in May. And the  
21 discovery rules are really clear that we are not limited to  
22 evidence that's only within the FTC's allegations. We are  
23 entitled to discovery to rebut those allegations as well.  
24 And that is precisely what we are trying to do. We have  
25 tried to narrow our requests and further narrow it as we

1 learn more. That's precisely what we're doing.

2 And here's why. This is what I don't want to get  
3 lost here. I know HSS's main -- excuse me -- I always want  
4 to say HHS. HSS's main facility inpatient hospital is in  
5 Manhattan. But that's only six miles from Bergen County, the  
6 FTC's alleged market.

7 And in addition to that, what are they doing in New  
8 Jersey? They're doing a lot, Your Honor. They opened an  
9 outpatient facility in Bergen County in 2014, expanded in  
10 2017, open a rehab facility in Bergen County in 2018, opened  
11 an urgent center in Bergen county in 2020. Every single  
12 public statement around those three openings or expansions  
13 say the following: We are doing this not only to serve  
14 people in Bergen County with these outpatient facilities, but  
15 we're doing it in addition, because when those patients need  
16 inpatient care, we're going to bring them over to our  
17 hospital in Manhattan.

18 They're also advertising in Northern New Jersey,  
19 trying to drive New Jersey patients into their facilities,  
20 including their Manhattan facility for inpatient treatment,  
21 that is treatment that is -- can be done -- and many of that  
22 treatment can be done in north -- in Bergen County, including  
23 by the defendant hospitals here.

24 So what we know is that -- and it's not surprising,  
25 Your Honor, given all of this effort that they sort of put

1 into targeting Northern New Jersey, that when we look at the  
2 publicly available data -- now, granted, it's a little old  
3 now. I think it's -- I don't remember -- four years old.  
4 But even that shows 19 percent of the discharges are coming  
5 from Northern and Central New Jersey. That is not by  
6 happenstance. That is by plan and design. And that is  
7 information related to those decisions, the rationale, and  
8 driving our patients in Northern New Jersey back to New York.  
9 That's what we want here, Your Honor. That's --

10 And that is highly relevant for our argument that  
11 the FTC's Bergen County-only market is not proper. We think  
12 that's what the --

13 THE COURT: Ms. Lamberg.

14 MS. LAMBERG: -- the fact that these hospitals are  
15 seeking --

16 THE COURT: Ms. Lamberg.

17 MS. LAMBERG: Yes?

18 THE COURT: -- a lot of this is -- I understand  
19 what you're saying, and a lot of it is things that you said  
20 in your papers.

21 I'm curious to know what your response is to the  
22 substantial need argument Mr. Kass made.

23 MS. LAMBERG: Sure. Sure.

24 I think that -- two parts. I think, number one, I  
25 think whether -- whatever standard it is, we meet it, number

1 one.

2 I think that we -- we have shown that the  
3 information that we are seeking is highly relevant to the  
4 questions of relevant market. It's highly relevant. It's  
5 not critical to show that Bergen County residents are  
6 choosing New York hospitals for services that defendants  
7 could have done, that New York residents are crossing the  
8 bridge, despite the tolls, et cetera, that the FTC claims are  
9 too burdensome. And we can show that this information is  
10 critical.

11 I will also say we can't get it elsewhere.  
12 Mr. Kass wants to suggest that we can go and get this  
13 information from the payors, that this information is in  
14 Englewood's files or Hackensack's files.

15 Not if you actually look at our requests. They're  
16 not. We are asking for things like this, Your Honor. We're  
17 asking for what is the -- documents about the strategic  
18 rationale for why you are planting these facilities for New  
19 Jersey. How many of those -- it says patients in New Jersey  
20 are being referred back to -- for inpatient care? What -- of  
21 the documents, what is your strategic rationale for directly  
22 contracting with a New Jersey payor? That stuff is not going  
23 to be in my client's files, I can tell you that. It's not  
24 going to be in the payor's files. It is only in their files.

25 So we have done our best to fill the gaps where we

1 can. And we are only requesting information now that cannot  
2 be achieved anywhere else. I promise you, I would be not  
3 going through this -- lengthy motion practice, et cetera, for  
4 stuff I've already got. I -- we just would not be doing  
5 that.

6 So we think whatever the standard is here, we meet  
7 it.

8 With respect to the case law, there is a case,  
9 Your Honor, that is directly on point here. It is a case  
10 from last year in Eastern District of Pennsylvania, a merger  
11 case, the FTC v. Jefferson. Same -- very similar fact  
12 pattern here, Your Honor. A -- this is a -- subpoenas went  
13 out --

14 (Simultaneous conversation)

15 THE COURT: Do you have the citation for that case?

16 MS. LAMBERG: Sure. 2020 WL 3034809.

17 THE COURT: Okay. Go ahead.

18 MS. LAMBERG: Yes. So just briefly -- I mean, it's  
19 a very short, like, three- or four-page opinion. But very  
20 briefly, a third party objected. The third party objected on  
21 basically very similar grounds to what you're hearing from  
22 Mr. Kass's client. They said, listen, we're not a  
23 competitor. We're not in the alleged market.

24 And the details here are a little bit important.  
25 So in that case, the FTC alleged both a general acute care

1 services market, like they did here. But that really wasn't  
2 at issue in the third-party dispute.

3           They also -- the FTC also alleged an inpatient  
4 acute rehab -- rehabilitation services market. And this  
5 third party came in and said, hey, listen, we don't actually  
6 fit within that alleged inpatient acute rehab services  
7 market. And we are not a competitor. And here's why, they  
8 said. They said, actually, the FTC's own complaint, they  
9 said -- this is -- they said that in the FTC's complaint,  
10 they had a statement like the following, that subacute  
11 rehabilitation services provided at skilled nursing  
12 facilities are not included in the market, inpatient acute  
13 rehabilitation services. And that third-party's argument  
14 was, hey, that's what I am. I am a skilled nursing facility,  
15 so I am not in the market. I don't have to give any  
16 documents.

17           And the court said, oh, no -- you are relevant to  
18 the defendant's defense in this case about what -- what  
19 whether you compete and whether you should be included in  
20 that market.

21           We are doing the same thing here, Your Honor.  
22 That's exactly the applicable case.

23           Some of the other cases --

24           (Simultaneous conversation)

25           THE COURT: And isn't your defense also that

1 it's -- that the FTC's theory is flawed. Right?

2 MS. LAMBERG: Yeah, our -- I mean, obviously, we --  
3 paper that we are -- we are taking issue with the alleged  
4 relevance geographic market, and the information we're  
5 seeking from HSS is directly going to that --

6 THE COURT: Right.

7 MS. LAMBERG: -- that dispute. That is what we  
8 are -- and we are only limiting at that point. We've tried  
9 to narrow it to really what we need. And I wish I could just  
10 get it from a public -- publicly available information. But  
11 there are some internal documents that we would like.

12 I'm frankly a little puzzled, Your Honor, like,  
13 protest thou too much. Why are we fighting so hard about  
14 what's probably is very limited amount of documents here  
15 about New Jersey, rather than just turning them over? I  
16 mean, it makes me think, wow, they must really think we're  
17 competitors. Because otherwise why would they -- why not  
18 just hand them over?

19 But -- and anyway, I'm getting -- but going back  
20 to -- I would -- the other thing I would like to briefly  
21 mention, Your Honor, is burden. We have not heard a -- other  
22 than sort of a general boilerplate objection to burden that  
23 you see in everybody's general objections and their responses  
24 and objections. They have articulated no burden here.  
25 During one phone call, they had mentioned kind of casual



1 remarks of concern about conducting an ESI search. And I  
2 immediately assured them to say, you know, if we can come to  
3 agreement on scope, we can identify custodians and do a --  
4 ESI search.

5 I have heard nothing other than that. And the  
6 reason why we've heard nothing other than that is because  
7 this is basically probably going to a handful of people and  
8 asking them to pull a few documents in the end of the day.

9 So I think, you know, going back to sort of the  
10 test, I think we -- we need it here. It's critical  
11 information to our case. We can't get it from anywhere else.  
12 And we -- I think the cases are clear that we are able to get  
13 information relevant to our defense.

14 Two other really quick points, many of the cases --  
15 and I am not going to take the time, unless Your Honor wants  
16 me to, I'm happy to go through the cases, if you'd like,  
17 but --

18 THE COURT: No. I want to keep --

19 (Simultaneous conversation)

20 MS. LAMBERG: Some of the cases that they --

21 (Simultaneous conversation)

22 THE COURT: -- I want to keep moving a little bit.  
23 We've got a lot of -- to cover here --

24 (Simultaneous conversation)

25 MS. LAMBERG: Okay. Okay. I would just -- suffice

1 it to say that we do not think the law out there says you can  
2 only get discovery confined to the alleged market that the  
3 plaintiffs are seeking, that if it goes to your defense or  
4 criticism of that market, it is discoverable information.

5 And only one example -- and I promise I'll move on,  
6 Your Honor -- is the FTC/Advocate case where they told you  
7 that the court ultimately decided that the specialty  
8 hospitals were not in the market at the end of the day.  
9 That's after trial, Your Honor. That doesn't mean that  
10 information wasn't discoverable and that they couldn't use it  
11 to inform what is the proper market. That's what we're  
12 trying to do here. So I don't think that that is in any way  
13 inconsistent with what we are arguing.

14 Of course, I will stop there. If you want me to go  
15 through the requests or talk about, you know, the cost  
16 issues, I'm happy to do that as well.

17 THE COURT: No, not necessary.

18 Mr. Kass, I'll give you brief opportunity to  
19 respond, but I think I have the idea here.

20 MR. KASS: Yes, Your Honor.

21 The only real issue I want to respond here is their  
22 cite to Jefferson, the Jefferson case, on which, you know, is  
23 what they rely on. The court in that case did not deal with  
24 a motion under 45(d)(3)(C). What it did was it applied  
25 the -- you know, the Rule 26 standard and did not apply the

1 26 -- I mean -- sorry -- the 45(b)(3)(C) standard, which is  
2 what our motion is brought on. The court did not actually  
3 apply the correct test.

4 Now, substantively, why did the court reach the  
5 conclusion that it did? It's really because the nature of  
6 the markets are so very different. There, in that case, as  
7 Englewood's counsel just explained, there were two relevant  
8 markets, the GAC market and then this brand-new  
9 rehabilitations market. The brand-new rehabilitations  
10 market, they were writing on sort of a clean slate. The FTC  
11 had never alleged a rehabilitation market in any other case  
12 before, and, really, the contours weren't entirely clear.

13 That's entirely different than the GAC markets that  
14 have been the bread and butter of FTC merger challenges for  
15 two or three decades. We even cited treatises that say that  
16 in all -- in all cases that the FTC has brought, they have  
17 alleged a GAC market, and the GAC cluster market has been  
18 upheld in every single instance. It's a product market  
19 question. It's not a geographic market question. It is a  
20 product market question.

21 And so when there was -- there was a question in  
22 Jefferson about whether a particular competitor -- there, a  
23 skilled nursing facility -- was competitive with an acute  
24 rehabilitation center, which is not a hospital, it's a  
25 rehabilitation market, the court said, yes, that's relevant.

1           Here, what we are saying is exactly that. If --  
2           were relevant, there would be some evidence that insurers  
3           would actually view us as a substitute when they're creating  
4           their network. And there isn't that threshold showing that  
5           is what they need to do to show that any discovery from HSS  
6           is relevant, let alone that they need to come to HSS in order  
7           to prove it.

8           So I'll stop there, Your Honor.

9           THE COURT: All right.

10          Thank you, both of you. You gave a fulsome  
11          presentation in the briefs, and you've supplemented it well  
12          with all of this argument today. I really -- I want to rule  
13          on this. And I've got --

14          (Simultaneous conversation)

15          THE COURT: I've got to move on to the other things  
16          as well. So I don't think I need any more argument on it.

17          Bergen County is served by six general acute  
18          hospitals. A general acute care hospital, as defined by the  
19          FTC's complaint, is a hospital that provides a broad cluster  
20          of hospital services, medical, surgical, and diagnostic  
21          services requiring an overnight hospital stay. The FTC  
22          alleges that the relevant market in this case is no broader  
23          than Bergen County, New Jersey. The FTC claims that the  
24          merger of Hackensack Meridian Hospital in Englewood would  
25          mean that Hackensack Meridian would have control of three of

1 the six Bergen County general acute care hospitals.

2 Hospital for Special Surgery claims that it  
3 specializes in orthopedic services, and Hospital for Special  
4 Surgery argues that, given its narrow focus, it is not  
5 seeking to replace other general acute care hospitals in the  
6 area in insurer networks, and, thus, a document production  
7 from Hospital For Special Surgery is not relevant in this  
8 litigation.

9 Englewood, however, contends that the documents it  
10 seeks are relevant to the litigation. Englewood claims these  
11 documents are relevant to Englewood's defense that the FTC's  
12 definition of the cluster market is utterly flawed.  
13 Englewood claims that it has narrowed the scope of the  
14 subpoenas and that a self-collection by relevant custodians  
15 would be acceptable. Englewood seeks responses only to  
16 Numbers -- to Request Number 4, 5, 6, 7, 9, 10, 12, and 13.

17 Discovery generally -- on the law, discovery sought  
18 by a subpoena issued pursuant to Rule 45 must fall within the  
19 scope of permissible discovery under Rule 26(b). Rule 26 is  
20 to be construed liberally in favor of disclosure, as  
21 relevance is a broader inquiry at the discovery stage than at  
22 the trial stage.

23 Pursuant to Rule 45(d)(3)(B)(i), a court may quash  
24 or modify a subpoena where the subpoena requires disclosing a  
25 trade secret or other confidential, research, development, or

1 commercial information. In the circumstances described in  
2 Rule 45(d)(3)(B), the court may, instead of quashing or  
3 modifying a subpoena, order appearance or production under  
4 specified conditions, if the serving party, one, shows a  
5 substantial need for the testimony or material that cannot be  
6 other met without undue hardship, and, two, ensures that the  
7 subpoenaed person will be reasonably compensated.

8 I'd also note that a nonparty to an action is  
9 afforded greater protection from discovery than a normal  
10 party and that in applying Rules 26 and 45, the court must  
11 balance several competing factors in assessing the  
12 reasonableness of a subpoena: Relevance, the parties' need  
13 for the documents, the breadth of the document requests, the  
14 time period covered by the document request, the  
15 particularity with which the documents are described, the  
16 burden imposed, and the subpoenaed recipient's status as a  
17 nonparty to the litigation. Those are seven factors we have  
18 to look at.

19 Generally, HSS -- the Hospital For Special Surgery  
20 argues that the subpoena should be quashed pursuant to  
21 Rule 45(d)(3)(B), (C), because the subpoena implicates  
22 confidential commercial information. Hospital For Special  
23 Surgery claims that Englewood cannot establish a substantial  
24 need for the information it seeks from Hospital For Special  
25 Surgery and that this need cannot be otherwise met.

1 First, the Hospital For Special Surgery argues that  
2 Englewood cannot establish a substantial need that the  
3 documents requested -- that the documents request are  
4 requested because -- that they actually substantially need  
5 the documents requested because any documents provided would  
6 show only the undisputed fact that Hospital For Special  
7 Surgery provides orthopedic services to the Tri-State area  
8 and beyond. Second, the Hospital For Special Surgery also  
9 argues that Englewood's alleged need cannot otherwise be met  
10 through alternative discovery.

11 Englewood, however, claims that the substantial  
12 need standard is not warranted in this case because Hospital  
13 For Special Surgery has just made generalized claims that the  
14 documents implicated contain confidential information.  
15 Furthermore, Englewood claims that the stipulated protective  
16 order entered in this case is sufficient to protect any  
17 concerns regarding the disclosure of a nonparty's  
18 confidential information. Further, Englewood argues that its  
19 requests are plainly relevant to show that the FTC's alleged  
20 relevant market, the cluster of -- and I quote -- "a cluster  
21 of individual inpatient general acute care hospital services  
22 that is no broader than Bergen County, New Jersey, is utterly  
23 flawed. End quote." Englewood concedes that Hospital For  
24 Special Surgery does not perform each and every one of the  
25 services offered at a general acute care hospital, but still

1 claims that specialty hospitals are relevant in general and  
2 acute care hospital services markets.

3           At the outset, I would note that I generally agree  
4 with Englewood's position. Discovery is a broad -- at the  
5 discovery stage, relevance is broad, and the information that  
6 people are allowed to seek is broad, and this is definitively  
7 a discovery dispute.

8           As a first point, the Court agrees that the  
9 protective order in this case is sufficient to protect any  
10 concerns regarding the disclosure of a nonparty's  
11 confidential information. Hospital For Special Surgery may  
12 certainly designate any responsive documents as confidential  
13 as set forth in the parties' stipulated protective order.  
14 And that's Number 63 on the docket.

15           The Court further agrees that the specific narrowed  
16 requests are relevant to Englewood's defense in this matter,  
17 which is attempting to rebut the FTC's definition of the  
18 relevant market in this case. The Court would also, as an  
19 aside, argue that the -- that Englewood has established,  
20 for -- at least for discovery purposes, substantial need.  
21 While the Hospital For Special Surgery is afforded the  
22 greater -- it's afforded greater protection from discovery  
23 than a normal party, the Court must balance that with the  
24 relevance of Englewood's request. Englewood also credibly  
25 claims that the specific requests it directed to Hospital For



1 Special Surgery cannot be obtained by any other party.  
2 Accordingly, both Englewood's need and relevance arguments  
3 outweigh the Hospital For Special Surgery's status as a  
4 nonparty.

5           Although the Hospital For Special Surgery does not  
6 specifically make a burden argument, in an effort to avoid  
7 any undue burden and in an effort to collect documents  
8 quickly, the Court determines that the Hospital For Special  
9 Surgery may engage in the self-collection method and that the  
10 parties may meet and confer regarding two or three relevant  
11 custodians to conduct this self-collection.

12           Each specific request -- I'm going to deal with  
13 each specific request at this point in my ruling.

14           Request Number 4 seeks documents and data  
15 sufficient to show Hospital For Special Surgery's primary  
16 service area and secondary service area. Englewood clarified  
17 in its proposed modification that it only seeks Hospital For  
18 Special Surgery's primary service area and secondary service  
19 area information for those services it does provide at the  
20 Hospital For Special Surgery's main campus and the Hospital  
21 For Special Surgery's system overall. This request, as  
22 modified by Englewood, shall be enforced, because its  
23 relevant to Englewood's defense.

24           Requests Number 5 and 6 seek documents analyzing  
25 competition with hospitals in Northern New Jersey as well as

1 analyzing or describing any plans to expand further into  
2 Northern New Jersey. Englewood has proposed limiting these  
3 requests to documents discussing, one, Hospital For Special  
4 Surgery's efforts to expand its inpatient and outpatient  
5 services in Northern New Jersey and the strategic rationale  
6 for doing so; two, the number of Northern New Jersey  
7 residents that come to Hospital For Special Surgery's main  
8 campus in ways to attract more of them; three, Northern New  
9 Jersey hospitals that compete with Hospital For Special  
10 Surgery's main campus; and, four, how Hospital For Special  
11 Surgery competes for patients that reside in Northern New  
12 Jersey through Hospital For Special Surgery through -- I'm  
13 sorry -- through Hospital For Special Surgery Paramus as a  
14 driver of patients to the Hospital For Special Surgery main  
15 campus for inpatient procedures.

16 Hospital For Special Surgery claims that these  
17 requests are outside the alleged market, and Englewood cannot  
18 show a substantial need for these sensitive documents.  
19 Hospitals For Special Surgery also claims that Englewood,  
20 during a meet-and-confer, agreed to further narrow the  
21 requests to formal presentations and strategic plans.

22 This request as modified by Englewood to the  
23 specific categories set forth above and further narrowed to  
24 only formal presentations and strategic plans shall be  
25 enforced because it's relevant to Englewood's defense.

1 Request Number 7 seeks documents reflecting  
2 Hospital For Special Surgery's rationale for opening the  
3 Paramus outpatient facility and the impact it has had on  
4 inpatient admissions at Hospitals For Special Surgery's main  
5 campus. This request shall be enforced because it is  
6 relevant to Englewood's defense.

7 Request Number 9 seeks documents concerning  
8 Hospitals For Special Surgery's negotiations with New Jersey  
9 payors. Englewood has narrowed this request to include only  
10 one document sufficient to show the terms of the contract  
11 and, two, strategic documents discussing the rationale for  
12 entering into those contractual relationships. Hospital For  
13 Special Surgery argues that during the meet-and-confer,  
14 Englewood narrowed the scope further to only two insurers  
15 that have New Jersey-specific plans: Horizon and Oxford.  
16 Hospital For Special Surgery requests that, if enforced, it  
17 be narrowed further to only documents specifically discussing  
18 Hackensack Meridian or Englewood and that it be permitted to  
19 redact any rate information.

20 This request shall be enforced because it is  
21 relevant to Englewood's defense, but it shall be narrowed to  
22 only Horizon and Oxford. The documents must reference either  
23 HM -- Hackensack Meridian or Englewood, and to further  
24 protect its concerns that sensitive data may be disclosed, in  
25 addition to the protect -- and this is in addition to the

1 protective order in place, Hospital For Special Surgery will  
2 be permitted to redact its rate information.

3           Requests Numbers 10 and 12 seek documents  
4 identifying each New Jersey payor and each health plan  
5 offered in New Jersey in which Hospital For Special Surgery's  
6 main campus is or has been a participating provider since  
7 January 2018. Hospital For Special Surgery, however, has  
8 already provided Englewood with public information regarding  
9 the plans it accepts and has explained that its contracts do  
10 not discriminate on the basis of geographic domicile.  
11 Hospital For Special Surgery also objects to the requests  
12 because it asks for all documents discussing possible  
13 termination of such contracts.

14           Englewood claims that the public information is not  
15 enough because it is insufficient to confirm which payors or  
16 plans are New Jersey-specific. And this is the one request  
17 among these where I think that Englewood is overreaching a  
18 bit in seeking to have Hospital For Special Surgery, perhaps,  
19 spin its wheels a little. Considering that Hospital For  
20 Special Surgery has represented that none of the payors or  
21 plans are New Jersey-specific, the Court directs that  
22 Hospital For Special Surgery certify that its plans do not  
23 discriminate on the basis of geographic domicile and that no  
24 such New Jersey-specific plans which Englewood seeks exist.  
25 And that will be sufficient for Requests 10 and 12.

1                   And Request 13 seeks information concerning  
2 Hospital For Special Surgery's advertising and marketing  
3 materials. Englewood has proposed limiting this request to  
4 materials and advertisements targeted at Northern New Jersey,  
5 including billboards, print advertisements in local  
6 newspapers, New Jersey Transit signage and similar materials.  
7 This request as modified by Englewood shall be enforced  
8 because it is relevant to Englewood's defense.

9                   I note that Mr. Kass mentioned the portion of his  
10 brief that addressed costs, and I note also that both sides  
11 have arguments on the propriety of costs in connection with  
12 this production.

13                   I am not going to put the cart before the horse and  
14 slow down this litigation and have a -- and have a full-blown  
15 motion prior to the production regarding what costs are  
16 appropriate and what costs aren't. I'm directing that  
17 Hospital For Special Surgery comply with these requests, that  
18 they seek costs, if they -- if they continue to desire them  
19 and continue to feel that they're appropriate, and then apply  
20 to the Court for costs, if there's a dispute. And I do  
21 not -- I would -- I would, you know, suggest that -- I don't  
22 think that there's going to be much argument for costs in  
23 connection with this motion because in the end we're  
24 enforcing most of Englewood's requests for information. I  
25 would just urge the parties when it comes to costs to take a

1 common-sense approach, and, again, make that application to  
2 me when the production has been made and after you've met and  
3 conferred on that, and it can be a side issue down the road,  
4 but it doesn't need to be something that holds us up now.

5 That -- I believe addresses the first issue on the  
6 subpoena to Hospital For Special Surgery.

7 The second issue was -- regarded the updated  
8 production of text messages. And I have been advised in a  
9 letter from the parties that that issue has, in fact, been  
10 resolved, document 102 on the docket. So I can set that  
11 aside mercifully, and we can move on to the next issue, which  
12 is the issue regarding the 30(b)(6) deposition -- or the  
13 proposed 30(b)(6) deposition of an FTC representative.

14 This dispute involves the -- obviously involves the  
15 FTC and involves both defendants, Hackensack Meridian Health  
16 and Englewood.

17 Who -- who is it that will be speaking for the FTC  
18 on this particular issue?

19 MR. LASKEN: Your Honor, this is Jonathon Lasken.  
20 Mr. Dickinson will be speaking for us. Charles Dickinson.

21 THE COURT: Okay.

22 So, look, I have -- well, frankly it is -- the  
23 application of defendants, and we have folks from Hackensack  
24 and from Englewood here.

25 I have your letter. I've reviewed the letter

1 carefully, and, you know, I think I understand the arguments  
2 on both sides.

3 Do one or both of you defendants want to say  
4 something, and if so, who is going to be?

5 MR. KESSLER: Your Honor, this is Jeffrey Kessler  
6 from Englewood. I am happy to answer any questions  
7 Your Honor has or to respond to the FTC, if they're going to  
8 make a presentation.

9 But if Your Honor feels you understand the issues  
10 in the letter and are ready to rule, then I see no reason to  
11 present the arguments for Your Honor that might be --

12 THE COURT: All right. I think I do understand.

13 I'll ask the FTC, Mr. Lasken, do you want to make a  
14 presentation or not?

15 MR. LASKEN: Let me throw it to Mr. Dickinson on  
16 that issue, because he's --

17 THE COURT: Well, that's right. I'm sorry. You  
18 had told me that before.

19 MR. LASKEN: No problem.

20 MR. DICKINSON: Good afternoon, Your Honor. Again,  
21 this is Charlie Dickinson, an attorney for the Federal Trade  
22 Commission.

23 I will do my best not to repeat anything  
24 unnecessary that we've already discussed in the brief or in  
25 the letter.

1 I do want to make just a couple of -- a couple of  
2 points. First, Your Honor, I want to note simply that the  
3 reason that the FTC seeks the protective order here, not  
4 because we don't want to disclose unidentified discoverable  
5 facts, but rather because the -- really, the extraordinary  
6 burden is on manner of the way in which the defendants are  
7 requesting it -- do the 30(b)(6) notice.

8 Your Honor, the defendants -- framed their notices  
9 in an attempt to discover facts. But, really, the question  
10 is what facts and to what end? We have repeatedly asked the  
11 defendants to clarify what it is they think they're missing  
12 or what they think -- to disclose. And we have not gotten an  
13 answer. The FTC believed, Your Honor, that we disclosed  
14 everything. We've disclosed our entire nonprivileged  
15 investigative file. We've refreshed our production,  
16 responded to written -- written responses to 25  
17 interrogatories and 22 requests for admissions, et cetera,  
18 et cetera.

19 We submit, Your Honor, that there's nothing left to  
20 discover. And we're simply aware of no fact that we could  
21 cite as evidence that has not already been disclosed to  
22 defendants.

23 So while we question whether there are any facts  
24 left to discover, it's important to also consider issues of  
25 proportionality. And the burden of preparing an FTC attorney



1 to sit for a deposition under -- you know, the really  
2 wide-ranging topics of this notice in a complex antitrust  
3 case such as this with a massive record is unjustified and,  
4 we think, disproportional to the need to discover whatever  
5 unspecified facts it is -- are still out there.

6           So it would certainly be a very significant burden,  
7 both the parties -- to the FTC, Your Honor, but also to the  
8 Court, which would undoubtedly be called on to adjudicate  
9 disputes over privilege and work product, also an effort that  
10 I think is unlikely to yield any useful information.

11           To be sure, Your Honor, the FTC is not a fact  
12 witness. We are not a percipient witness to any matter  
13 relevant to this litigation. The facts we obtained here are  
14 mostly from the defendants themselves and from third parties,  
15 are something that the defendants have already, either have  
16 or have availed themselves through discovery -- that the  
17 plaintiffs have.

18           So I guess just lastly, Your Honor, because we're  
19 emphasizing that if the FTC were required to sit for a  
20 deposition like this one, we would necessarily need to  
21 designate time for a -- in this litigation or someone with  
22 knowledge gained exclusively from counsel of record. There  
23 simply is no other option available. And that is not an  
24 appropriate use of Rule 30(b)(6), I submit.

25           So because -- again, because we think we've

1 disclosed already all of the facts that we've obtained from  
2 defendants and third parties, what's left really are the  
3 inferences that our attorneys have drawn from that previously  
4 disclosed evidence and how our attorneys have marshaled or  
5 intend to marshal at the trial all of that previously  
6 disclosed evidence. And none of that is discoverable,  
7 Your Honor.

8           So we hope -- we hope to avoid this burden, which I  
9 can assure you will be significant, an obvious disruption to  
10 counsel, you know, a mere eight weeks or so before the start  
11 of the trial. And so, you know, we appreciate the Court's  
12 time and patience in hearing our requests.

13           With that, I'm happy to take any questions you  
14 have.

15           THE COURT: No. I think I understand. You have  
16 said, you know, many of the things that were said in the  
17 papers. I understand where you're coming from,  
18 Mr. Dickinson.

19           Mr. Kessler, do you want to respond or? Are you  
20 all right --

21           (Simultaneous conversation)

22           MR. KESSLER: I'll be very brief, Your Honor.

23           THE COURT: All right.

24           MR. KESSLER: We appreciate the fact that the FTC  
25 would like to not have the burden of 30(b)(6). Defendants

1 would like that too. We have sat for 30(b)(6) depositions,  
2 both defendants. Third parties have been subject to 30(b)(6)  
3 depositions. You have to spend the time to prepare your  
4 witnesses. It is a burden, but it is a burden of civil  
5 litigation which every litigant, including the Government  
6 must bear. The exact language of 30(b)(6) makes it  
7 applicable to the Government. So while it's a burden they  
8 would not like, they decided to bring this preliminary  
9 injunction action as a civil litigant; they are subject to  
10 that burden.

11 My only second point is what facts do we need? The  
12 facts we need, Your Honor, are the facts which are the basis  
13 for the allegations in the complaint, a very traditional form  
14 of 30(b)(6) discovery. And the reality is we have tried to  
15 get this information every which way and have been  
16 unsuccessful. Their responses to interrogatories have been  
17 evasive and simply referred us to future expert testimony or  
18 a pile of documents for us to fish through. The same thing  
19 on the requests for admit. We raise this in meet-and-confers  
20 over and over again. We have gotten no satisfactory  
21 response.

22 We think their obligation under 30(b)(6), just like  
23 ours, is to have a witness prepared to answer very simple  
24 questions. In which paragraph of the complaint you make this  
25 allegation? What are the facts you're aware of which support

1 that allegation at the time you made it? Very simple. We'll  
2 get clear answers with follow-up. They won't be able to say,  
3 oh, we'll answer that some other way or go look at a bunch of  
4 documents. That's what 30(b)(6) requires. It'll be very  
5 efficient. And I do not anticipate any issues of privilege  
6 or work product having to be presented to the Court, because  
7 we're not going to ask anything that is privileged or work  
8 product.

9 Thank you, Your Honor.

10 THE COURT: All right. Thank you, Mr. Kessler.

11 At the outset, I'd note that there's no absolute  
12 right to this deposition from the FTC. And many courts have  
13 quashed this deposition notice when given the appropriate  
14 circumstances to do so. FTC has cited a slew of cases for  
15 that proposition on pages 1 and 2 of the joint letter, which  
16 is Docket Number 105, as I noted earlier.

17 The Court concedes that the defendants have cited  
18 cases where such a deposition has been allowed. So we have  
19 competing authorities, apparently, and we need to consider  
20 the parties' respective arguments and showings to determine  
21 what is proper, given the circumstances currently before us.

22 The FTC's principal objection to the proposed  
23 deposition appears to be that it will have to be a trial  
24 counsel, and that it will necessarily involve delving into  
25 legal reasoning, legal strategy, and work product. I think

1 the FTC's point is well taken. It does appear that the  
2 topics which defendants want to explore will almost  
3 inescapably delve into such things. In fact, I find myself  
4 asking the question how could they not get into such things?

5           The discoverable facts here, at least regarding  
6 those that the defendants would seek to discover from the  
7 FTC, do not seem to the Court to be all that substantial or  
8 all that critical. Rather, the critical facts -- the  
9 critical facts appear mostly to head in the other direction.  
10 Legal theories and strategies are the main items that the FTC  
11 would bring to the table via discovery. The FTC is not a  
12 party who agreed to the challenged merger, who had any part  
13 in brokering, or who had any part in competing in the  
14 relevant market. In other words, it is not a participant  
15 insofar as none of its employees or agents gave rise to the  
16 cause of action in the same way they would in, for example,  
17 an FTCA or a Title VII action. For this reason, I'm  
18 skeptical of the need for this deposition, and I'm troubled  
19 by the request.

20           The Court would also note that the defendants have  
21 other avenues to obtain pertinent discovery, not the least of  
22 which is the written questions they have served upon the FTC  
23 and which the FTC has said it will answer. As the FTC has  
24 noted, these written questions cover much of the same ground  
25 that a 30(b)(6) deposition would cover, or, from the Court's

1 view, at least, to the extent these written questions don't  
2 cover much of the same ground, they certainly could cover the  
3 same ground as drafted as such.

4           Accordingly, this avenue of discovery is  
5 sufficient. Although the defendants have said in their  
6 papers that they have exhausted all alternative avenues for  
7 discovery of this disputed evidence, it appeared to me, at  
8 least, as of the writing of these briefs on the motion -- or  
9 as of the writing of the letter that I'm considering, that  
10 the defendants have not yet received the answers.  
11 Mr. Kessler has said that he has received the answers now,  
12 and he's dissatisfied with them, but I can't imagine that we  
13 wouldn't have the same problems and he wouldn't be  
14 dissatisfied with answers at a deposition.

15           The Court trusts that fulsome appropriate answers  
16 to a written questions could and would provide defendants  
17 with what they need, particularly at this point in the  
18 litigation, and to the extent there's a dispute regarding the  
19 answers to the questions by the FTC, the parties would have  
20 an obligation to meet and confer and to address that dispute  
21 and to see if a more full-bodied answer could be given to the  
22 question, and then if a dispute remained about the  
23 sufficiency of the answer to the written questions, then, you  
24 know, that would have to be brought to the Court's attention.

25           Defendants urge that the FTC can designate a

1 nonattorney to sit for a 30(b)(6) deposition, but the Court's  
2 not so sure of that. First of all, as it appears to the  
3 Court that any such deposition will necessarily involve  
4 attempts to discover, perhaps almost exclusively, legal  
5 theories, legal strategy and work product, I am not sure that  
6 a nonattorney would be competent to sit for the deposition.  
7 And even if a nonattorney were competent to do so, what  
8 difference would it really make if the discovery would still  
9 involve legal points fed to the witness by FTC attorneys that  
10 would otherwise be privileged? I do not think, therefore,  
11 that the designation of a nonattorney would solve the basic  
12 problems here.

13           Finally, I am not especially concerned about the  
14 proposed 30(b)(6) deposition, given the current posture of  
15 the case. The relief requested in the complaint is being  
16 treated on an emergent basis, and any undue delays may  
17 inordinately derail what is already a tight and very busy  
18 discovery schedule. I envision the deposition of an FTC  
19 representative quickly devolving into an all-out war  
20 regarding privilege in which constant objections will be  
21 raised and innumerable requests to the Court for relief will  
22 be made. That will unnecessarily increase the burden on the  
23 parties and on the Court and will, most troublingly, slow the  
24 case down to a crawl. I have no intention of doing that.

25           In making this observation, I am not intending to

1 convey a message that I would approve of the proposed  
2 deposition if it were not on an emergent time line, but only  
3 that this is an additional and fairly important reason why  
4 the proposed deposition isn't appropriate.

5 Accordingly, I'm going to quash the subpoena that  
6 the defendants have served upon the FTC for a 30(b)(6)  
7 deposition.

8 The next issue to be considered -- they're  
9 relatively straight forward in comparison to the first two  
10 issues, and they kind of go hand in hand. I've -- that was  
11 Issue 4 and Issue 5. But I probably will deal with them  
12 together.

13 Issue 4, I've listed as regarding the Englewood  
14 subpoena to New York Presbyterian, and Issue Number 5 is that  
15 the defendants have asked Judge Vazquez for a two-week  
16 extension of discovery in this case. And, again, I think  
17 these two issues may go hand in hand. The Englewood  
18 subpoena -- it sounds like the parties have agreed to the  
19 scope of the subpoena, but there's only a dispute as to the  
20 timing. Englewood wants New York Presbyterian to provide the  
21 responses to the subpoena by March 17th, and needs -- and  
22 claims to need the responses prior to being able to depose  
23 New York Presbyterian's 30(b)(6) representative. And New  
24 York Presbyterian has said that they need a couple of more  
25 weeks to respond to the subpoena. It's just becoming



1 difficult to get all of the information together.

2 Mr. Kessler, you're on this issue again? Do you --  
3 or any of your team have anything to say about this?  
4 Anything to add to what I've already said? --

5 (Simultaneous conversation)

6 MR. KESSLER: Go ahead.

7 MS. LAMBERG: Sorry, Jeffrey.

8 This is Heather Lamberg again. I'll be handling  
9 this.

10 But, you know, I don't really have anything more to  
11 add than what is in our letter. I'm happy to address any  
12 questions or concerns you have. But I don't need to rehash  
13 what's there.

14 THE COURT: Okay. And you're requesting that New  
15 York Presbyterian -- the key requests for production that you  
16 want them to respond to quickly are 2, 5, 6, 7, 9, 10, 14,  
17 and 15? Is that right?

18 MS. LAMBERG: Yes, that's right. And it's a  
19 combination -- among -- are those the right requests. And a  
20 combination among those requests. Some of them are -- and  
21 some of them are, you know, custodians and search terms. So  
22 it's a combination amongst those requests. Correct.

23 THE COURT: Okay. Mr. -- for New York  
24 Presbyterian, who are we going to hear from?

25 MR. STEREN: Thank you, Your Honor. This is John

1 Steren from Epstein Becker & Green.

2 THE COURT: Okay. Now, Mr. Steren, let me just  
3 jump right in, and this is a pretty straightforward dispute.  
4 It doesn't involve the twists and turns the first two had.  
5 You say you need a little more time. Is that right?

6 MR. STEREN: We do, Your Honor.

7 THE COURT: When do you think you can get this  
8 done?

9 MR. STEREN: So, we had proposed to counsel for  
10 Englewood that one of the` problems -- until the end of  
11 the -- to complete the ESI production.

12 THE COURT: So you're essentially seeking a  
13 two-week extension from the 17th to the 31st?

14 MR. STEREN: I think that's right, Your Honor.

15 THE COURT: All right. And again, this is the  
16 reason I why that thought Issue 4 and Issue 5 dovetail. The  
17 defendants had asked Judge Vazquez for a two-week extension  
18 of discovery. The FTC has responded and said that they're  
19 onboard for a week, but they're not onboard for two weeks.

20 Quite frankly -- look, I could hear from everybody  
21 on this issue, but I've talked to Judge Vazquez, and he wants  
22 the case to move forward. He wants the case to stay largely  
23 on the schedule that it's on. But he doesn't find a problem  
24 with extending the deadlines for discovery by two weeks.

25 So my inclination is to give -- well, my

1 inclination -- I think my decision is to give New York  
2 Presbyterian the two weeks to respond to the subpoena and to  
3 extend the discovery deadlines respectively by two weeks so  
4 that the defendants will have the necessary time to do the  
5 30(b)(6) deposition of the New York Presbyterian  
6 representative and to do whatever other discovery they need  
7 to do.

8 I don't think at this point I'm going to tinker  
9 with Judge Vazquez's dates for the hearing. But I would  
10 suggest is that, perhaps, you contact Judge Vazquez regarding  
11 the hearing date, and if you think that those dates need to  
12 be put off a week or two as well, he certainly would be happy  
13 to hear from you and to consider that request. All right?

14 MR. STEREN: Thank Your Honor.

15 UNIDENTIFIED SPEAKERS: Thank Your Honor.

16 MR. LASKEN: This is John Lasken from the FTC.

17 Can I just ask one question there?

18 THE COURT: Sure.

19 MR. LASKEN: You know, our concern here is that has  
20 been -- I don't want to call it mystery unavailability, but  
21 unavailability of without explanation. And a lot of people  
22 had scheduled to sit for depositions at certain times. I  
23 just want to make sure that in giving the extra two weeks, is  
24 the Court sort of authorizing moving depositions that are  
25 already scheduled? Or is the Court anticipating that we

1 would push to meet with the schedule that's --

2 (Simultaneous conversation)

3 THE COURT: I would hope -- I would hope that you  
4 would proceed with depositions that are already scheduled.  
5 And the only thing that I would expect might change are the  
6 things like the New York Presbyterian 30(b)(6) deposition  
7 where the defendants say, look, we've got to have these  
8 documents before we can do that. So you can't go forward  
9 with the deposition in the next few days, and that would be  
10 rescheduled, I would anticipate.

11 But, no, I am not -- I am not -- you know, you guys  
12 have to work together, and I am not going to sit here and  
13 assign dates to the depositions, but I am not anticipating  
14 nor do I encourage nor do I expect that depositions that are  
15 currently scheduled and that can go forward, you know,  
16 because you have the appropriate documents, the appropriate  
17 discovery, that they will be changed. I think you need to  
18 stick to the schedule you've got as much as you can, so that  
19 we don't really fall behind.

20 MR. LASKEN: Thank you Your Honor.

21 THE COURT: All right?

22 With that, do we have anything for -- I almost  
23 cringe when I ask this, but do we have anything further from  
24 anybody?

25 MR. SAINT-ANTOINE: Your Honor, this is Paul

1 Saint-Antoine from Faegre Drinker on behalf of Hackensack.  
2 It's just a clarification on that last point, on there  
3 were -- since the letter briefs went in, there have been some  
4 adjustments on at least a couple of the third-party  
5 depositions. And I just want to make sure that that we don't  
6 have an issue with our colleagues at the Federal Trade  
7 Commission on those new dates.

8 THE COURT: Well, every --

9 (Simultaneous conversation)

10 THE COURT: Everybody's here, so you can ask them.

11 MR. LASKEN: Your Honor, no, we don't have an issue  
12 with the new dates --

13 THE COURT: All right. All right, guys.

14 Look, I know you guys are working hard, and I know  
15 you've got mountains of work to do in the next month or two.  
16 You've got to work together to some degree, and if you have  
17 problems, you're more than welcome to bring them to us. I  
18 hope you can work them out, obviously, but I'm sure this is  
19 not the last time I'm going to speak with you all. And,  
20 again, if you find that the discovery schedule necessitates a  
21 postponement of the hearing, I wanted you to know that Judge  
22 Vazquez would entertain that. But it would be better to get  
23 to him earlier rather than later. All right? And he doesn't  
24 want to postpone it very much, I must say. He does want to  
25 get to -- wants to get to the finish line here.

1 All right?

2 MALE SPEAKER: Thank Your Honor.

3 THE COURT: Okay. Well, thank you all for calling  
4 me. Have a good rest of the week and weekend. And stay  
5 safe. All right, folks?

6 UNIDENTIFIED SPEAKERS: Thank you, Your Honor.

7 (Conclusion of proceedings)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 55 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ *Sara L. Kern*

15th of March, 2021

Signature of Approved Transcriber

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